No. 45491-2-II
(Consolidated)

Pierce County No. 12-1-01851-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GERARDO HERNANDEZ,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Stanley Rumbaugh, trial judge

OPENING BRIEF ON BEHALF OF MR. HERNANDEZ

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1. The sentencing court imposed an exceptional sentence based on an aggravating factor not charged in the amended information.

2. Appellant Gerardo Hernandez was deprived of his Sixth Amendment and Article I, § 22, rights to adequate assistance of appointed counsel.

3. The aggravating factor of "Major Violation of the Uniform Controlled Substances Act" does not apply to an accomplice and there was insufficient evidence to support its application to Mr. Hernandez.

4. The two crimes amounted to the same criminal conduct and counsel was ineffective in failing to so argue and in further arguing that an exceptional sentence should be imposed.

5. There was insufficient evidence to prove that Hernandez had constructive or actual possession of the drugs.

6. The trial court erred in refusing to suppress evidence seized during searches of vehicles and an apartment under a warrant not supported by sufficient probable cause, in violation of appellant's rights under the Fourth and Fourteenth Amendments and Article I, § 7.

7. A drug dog "alert" is not sufficiently reliable to support a finding of probable cause and the trial court erred in holding to the contrary. Absent that evidence, the warrant affidavit was insufficient to support the searches and the evidence should have been suppressed.

8. The sentencing court erred in ordering forfeiture of property without statutory authority and in violation of RCW 9.92.110. This Court's decision in State v. Roberts, 185 Wn. App. 94, 339 P.3d 995 (2014), controls.

9. Appellant assigns error to the "boilerplate," pre-printed finding 2.5, which provides:

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's part, present and future ability to pay legal financial obligations, including the

defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 246.

10. The trial court erred in failing to conduct the required inquiry into Hernandez's individual financial circumstances and his likely ability to pay prior to imposing legal financial obligations and this Court should exercise its discretion to address the issue under State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

11. Pursuant to RAP 10.1(g) and this Court's Order of consolidation, Hernandez adopts and incorporates herein by reference all of the arguments presented in the opening briefs of codefendants Guadalupe Cruz Camacho and Javier Espinoza.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the prosecution first charges a crime with an aggravating factor but then amends the information to remove that factor and add a new sentencing enhancement, must the exceptional sentence based on the deleted aggravating factor be reversed?

2. Must the exceptional sentence be reversed because it was based on the aggravating factor that the crimes amounted to "Major Violations of the Uniform Controlled Substances" Act, that aggravator does not apply to an accomplice and the jury did not find that appellant's own conduct supported it?

3. Is counsel prejudicially ineffective in failing to notice that his client was being subjected to an exceptional sentence based on an uncharged aggravating factor, that the factor did not apply and that the two convictions for which his client was being sentenced should have counted as one in the offender score under the "same criminal conduct" doctrine? Further, is counsel who makes such unprofessional failures ineffective in urging the court to exceed the standard range and impose an exceptional sentence which was not supported?

4. Is there insufficient evidence to convict a defendant of actual or constructive possession of drugs found in an apartment simply because he spent time there with other people and was found leaving the apartment with money?

5. Is a dog "sniff" of the outside of a car a search under Article 1, § 7? Further, is dog "sniff" evidence so inherently unreliable in general and in this particular case that it cannot support probable cause?

6. Did the trial court err in upholding the seizure of evidence pursuant to a warrant even though the warrant was unsupported by probable cause?

7. A sentencing court is limited to imposing only those sentences supported by statute. Did the trial court act outside its statutory authority in ordering forfeiture of property as a condition of the sentences even though there was no statute authorizing such an order?

8. Did the sentencing court further err in failing to make the required findings about Hernandez having a present or future ability to pay, prior to imposing a requirement that he pay legal financial obligations as a condition of the sentences?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Gerardo Hernandez charged by amended information with unlawful possession of methamphetamine with intent to deliver and unlawful possession of heroin with intent to deliver, both with a school bus route stop enhancement. CP 91-92; RCW 9.94A.533(6); RCW 69.50.401(1)(2)(a) and (b); RCW 69.50.435. Also accused were several others, including Javier Espinoza and Guadaupe Cruz Camacho. CP 91.

Pretrial motions were held before the Honorable Judges James Orlando, Ronald Culpepper, Stanley Rumbaugh and Bryan E. Chuschcoff

in 2013, with a suppression hearing in front of Judge Culpepper in early June of that year and, ultimately, a jury trial before Judge Stanley Rumbaugh on September 5, 9-12, 16-19, 2013.[1] The jury convicted of the charges and entered findings in support of the school bus route stop enhancement as well as an aggravator that the crimes were "Major Violations of the Uniform Controlled Substances Act."[2] CP 202-207.

At sentencing on October 18, 2013, Judge Rumbaugh imposed an exceptional sentence above the standard range. 10RP 19; CP 236-49.

Hernandez appealed. CP 254-65. Remand for reconstruction of the record was ordered in 2014, due to the lack of a full record for the suppression hearing. This pleading follows. See CP 264-65.

2. Testimony at trial

Pursuant to RAP 10.1(g), Mr. Hernandez adopts and accepts the statements of facts set forth in the Opening Brief on Appeal filed on behalf of codefendants Espinoza and Camacho. In addition, he submits the following:

Mr. Hernandez was driving a Nissan with Oregon license plates, and his wife and two young children were in the car. 3RP 31-32, 4RP 45-

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[1]The verbatim report of proceedings in this case is extensive and unfortunately not chronologically paginated. The trial and sentencing dates of September 5, 9, 10, 11, 12, 16, 17, 18 and 19, and October 18, 2013, are marked as separate volume numbers and will be referred to as such (i.e., 1RP - volume "1," September 5, 2013). The other volumes will be referred to by their dates (i.e., 3/8RP for the volume containing March 8, 2013).

[2]That allegation was not contained in the amended information. CP 91-92. The propriety of the sentence based on that factor is discussed, *infra*.

46. There were no hidden compartments in Mr. Hernandez' car, nor were there drugs. 3RP 44. The money found in his car was not wrapped up in cellophane. 3RP 44. Instead, it was in a bag on the floor found on the front seat passenger side, where his wife was sitting, her purse nearby. 3RP 44.

The only car that Barney "really got to work all of" in the parking lot was the Nissan with California plates. 4RP 55.

The testimony that Barney had "jumped" onto the driver's side window and thus "alerted" in the field was refuted by Officer Walkinshaw later, when he admitted that Barney again went through the vehicle once it was in custody with Tacoma Police and there was no alert. 4RP 55-5, 69.

In the 10th Avenue apartment the bulk of the drugs were not in any area where a normal visitor would have seen them, and there were no fingerprints done on the bags of drugs to show who might have handled them. 4RP 38-49, 6RP 17, 31-39.

Hernandez did not have a key to the apartment and nothing of his was found inside. 3RP 38, 6RP 68-70. The only ID found in the apartment belonged to Camacho, who had the apartment key in his pocket when arrested. 6RP 77-78.

It was Camacho who was seen outside the apartment working on the cars with California license plates. 3RP 38, 6RP 68-70. The Ford with the hidden compartment was driven by Camacho. 3RP 38-39, 6RP 75. Another car registered to Camacho was parked at the apartment complex

and it also had a hidden compartment. 3RP 37.

D. ARGUMENT

1. THE EXCEPTIONAL SENTENCE MUST BE REVERSED

On October 18, 2013, Judge Rumbaugh imposed an exceptional sentence of 156 months plus the 24 month bus stop enhancement, for a total of 180 months, far above the standard range of 44-84 months. CP 236-49. In imposing the exceptional sentence, the judge relied on the jury's finding that the crimes amounted to "a major violation of the Uniform Controlled Substances Act." 10RP 18.

That sentence must be reversed. First, the sentence was based on an aggravating factor uncharged in the amended information. Second, the factor does not apply to someone convicted as an accomplice and there was insufficient evidence that it applied to Hernandez. Third, throughout the proceeding, counsel's performance was so deficient that Hernandez was deprived of his constitutional right to effective assistance of counsel, as counsel failed to object to the improper sentence, failed to note that the factor did not apply to his client and failed to argue that the crimes were the same criminal conduct, instead *conceding* that an exceptional sentence should be imposed. Either taken separately or as a whole, these serious errors compel reversal and remand for imposition of a new, standard-range sentence.

a. The prosecution chose to amend the information and the amended information controls

In this state, an action is commenced in a criminal case only by the filing of an indictment or information. CrR 2.1(a); see State v. Corrado, 78 Wn. App. 612, 615, 898 P.2d 860 (1995). The prosecution is not limited to the claims in the initial charging document, however, and may file an amended information - or several - before trial, and even, in some situations, before the close of the state's case. See CrR 2.1(d). An information can be amended any time prior to the verdict, provided the substantial rights of the defendant are not prejudiced. See State v. Barnes, 146 Wn.2d 74, 81-82, 43 P.3d 490 (2002).

When the prosecution files an amended information, that information controls. State v. Theroff, 95 Wn.2d 385, 392, 622 P.3d 1240 (1980); see State v. Alferez, 37 Wn. App. 508, 514-15, 681 P.2d 859, review denied, 102 Wn.2d 1003 (1984). Put another way, any earlier filed information no longer holds force and the subsequently filed information "supersedes" the original. See State v. Oestreich, 83 Wn. App. 648, 651, 922 P.2d 1369 (1996), review denied, 131 Wn.2d 1009 (1997).

Thus, a second information filed in the same proceeding "manifestly supersede[s]" the first. See State v. Navone, 180 Wash. 121, 123-24, 39 P.2d 384 (1934).

As a result, in State v. Kinard, 21 Wn. App. 587, 589-90, 585 P.2d 836 (1978), review denied, 92 Wn.2d 1002 (1979), where the prosecution chose to file an amended information, the trial court erred in allowing the

trial to go forward on the charges set forth in both the original and amended charging documents. 21 Wn. App. at 588. In Kinard, the defendant was arrested and charged with first-degree assault. 21 Wn. App. at 588. The prosecution later chose to file an amended information charging only possession of cocaine. Although the defendant objected and moved to dismiss the first information, he was tried and convicted of both the assault and the possession, with the trial court finding that the second filing "merely supplemented the first." Id.

This theory was soundly rejected on review. 21 Wn. App. at 589. The appellate court noted that cases in this state have "uniformly held, that the filing of . . . an amended information constitutes an abandonment of the first information." 21 Wn. App. at 589. The prosecution had chosen to file an amended information and that was the information which controlled, so the trial court had committed reversible error and the assault conviction had to be dismissed. Id.

Indeed, as far back as 1934, the Supreme Court has made it clear that an amended information supersedes any previously filed. See Navone, 180 Wash. at 123-24. In Navone, the defendant objected that the prosecution had to "elect" whether it was proceeding on either an original or amended information. 180 Wash. at 122. The Supreme Court dismissed this theory, because "[t]he second information was filed in the same proceeding as the first and manifestly superseded the same."

In this case, the initial information charged the two counts as

follows:

That GERARDO RAFAEL HERNANDEZ acting as an accomplice, on or about the 17th day of May, 2012, did unlawfully, feloniously, and knowingly possess, with intent to deliver to another, a controlled substance, to-wit: Methamphetamine. . .**and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(e) The current offense was a major violation of the Uniform Controlled Substances Act,** chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition. The presence of ANY of the following may identify the current offense as a major VUCSA: (i) The current offense involved at least three separate transactions . . . (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; (iii) The current offense involved manufacture of a controlled substance for use by other parties; (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy; (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or (vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional), and against the peace and dignity of the State of Washington.

. . .

That GERARDO RAFAEL HERNANDEZ acting as an accomplice, on or about the 17th day of May, 2012, did unlawfully, feloniously, and knowingly possess, with intent to deliver to another, a controlled substance, to-wit: Heroin. . .**and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(e) The current offense was a major violation of the Uniform Controlled Substances Act,** chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition. The presence of ANY of the following may identify the current offense as a major VUCSA: (i) The current offense involved at least three separate transactions . . . (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; (iii) The current offense involved manufacture of a controlled substance for use by other parties; (iv) The

> circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy; (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or (vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional), and against the peace and dignity of the State of Washington.

CP 1-2 (emphasis added). That information was filed on May 21, 2012. CP 1.

On September 5, 2013, the prosecution filed an amended information, adding the bus route stop enhancement, and charging the crimes as follows:

> That GERARDO RAFAEL HERNANDEZ, in the State of Washington, on or about the 17th day of May, 2012, did unlawfully, feloniously, and knowingly possess, with intent to deliver to another, a controlled substance, to-wit: Methamphetamine, classified under Schedule II of the Uniform Controlled Substance Act, contrary to RCW 69.50.401(1)(2)(b), and in the commission thereof, the defendants were within 1,000 feet of a school bus route stop, contrary to RCW 69.50.435, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533(6), and against the peace and dignity of the State of Washington.
>
> . . .
>
> That GERARDO RAFAEL HERNANDEZ, in the State of Washington, on or about the 17th day of May, 2012, did unlawfully, feloniously, and knowingly possess, with intent to deliver to another, a controlled substance, to-wit: heroin, a narcotic, classified under Schedule I of the Uniform Controlled Substance Act, contrary to RCW 69.50.401(1)(2)(a) - 1, and in the commission thereof, the defendants were within 1,000 feet of a school bus route stop, contrary to RCW 69.50.435, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533(6), and against the peace and dignity of the State of Washington.

CP 91-92.

Thus, the prosecution chose to take advantage of its authority to amend the information, adding another allegation which added additional potential time to the resulting sentence. See RCW 69.50.435 (school bus route stop presumptive additional time added to the sentence). As a matter of law, that amended information superseded the first. See Oestreich, 83 Wn. App. at 648; see also, Theroff, 95 Wn.2d at 392; Alferez, 37 Wn. App. at 514-15.

And that amended information *deleted* the allegation that the crimes were aggravated because they amounted to a "Major Violation of the Uniform Controlled Substances Act." CP 91-92; see 9/5RP 21(prosecutor filing amended information; mentioning only that it added a school bus stop; assuring the court she had previously informed counsel of her intent and saying she had been meaning to amend the information for several months).

The exceptional sentence based on this uncharged aggravating factor must therefore be dismissed. Just as in Kinard, here the prosecution made the choice to amend the information, and deleted part of the original charge. Just as in Kinard, the prosecution should be held to that choice. The amended information added the bus route stop enhancement and thus increased the sentence Mr. Hernandez faced, and while it may not have been the prosecutor's intent to also delete the aggravating factor as part of the charge, she deleted it nonetheless. CP 91-92.

As the Supreme Court has stated, requiring the prosecution to

include all of its allegations in the current information is a "clear and easy to follow rule." Theroff, 95 Wn.2d at 939. Indeed, it is so clear and easy to follow that, in Theroff, the Supreme Court majority dismissed an enhanced penalty because the prosecutor had not properly charged it under the relevant statutes requiring it at the time. 95 Wn.2d at 392, quoting, State v. Cosner, 85 Wash.2d 45, 50-51, 530 P.3d 317 (1975). The Court reached this conclusion even though dissenters would have found to the contrary, because it was clear that Theroff and his attorney knew of the state's intent to seek the enhanced penalty and there was no one "misled." Theroff, 95 Wn.2d at 392-93.

Plainly stated, the Theroff Court said, "[b]ecause the prosecutor here did not follow the rule, he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant." 95 Wn.2d at 393.

In response, the prosecution may attempt to rely on some broad language in a deeply divided decision involving a different issue, State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012). Any such effort should fail. In Siers, the defendant was accused of second-degree assault but the aggravating factor was not alleged in the charging document. 174 Wn.2d at 271. The issue on appeal was whether an aggravating factor was the "functional equivalent of" an essential element of the higher crime of "aggravated second-degree assault" under the Sixth Amendment and jury trial rights cases stemming from Apprendi v. New Jersey, 530 U.S. 466,

120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

At trial, the prosecution had failed to charge a "Good Samaritan" aggravator. Siers, 174 Wn.2d at 272. After the parties rested, the defense objected to the proposed jury instruction for the uncharged aggravator, the prosecution had moved to amend the information and the trial court denied the motion to amend but allowed the aggravator to go to the jury. 174 Wn.2d at 272-73. At sentencing, the judge did not impose an exceptional sentence but did consider the aggravator in imposing a sentence at the high end of the standard range. 174 Wn.2d at 272-73.

On appeal, the defendant argued that the *entire conviction* must be reversed under Apprendi and Blakely. Siers, 174 Wn.2d at 272-73. In a divided opinion, the Court of Appeals panel agreed. Id. The reasoning was 1) under Apprendi and Blakely any fact which increases the penalty becomes an "essential element" of the higher, aggravated crime, 2) all "essential elements" of a crime must be pled in the information, 3) failure to charge the aggravating factor "essential element" of the higher, aggravated crime was therefore fatal to the conviction for the underlying, non-aggravated crime. Siers, 174 Wn.2d at 274.

And it reached this conclusion even though the sentencing court did not impose an exceptional sentence for the "aggravated crime." Id. Further, the underlying crime had been properly charged. 174 Wn.2d at 275.

On review, a bare majority of the Supreme Court reversed, holding that an aggravating factor was not the functional equivalent of an element of the aggravated crime, so that the base crime conviction was properly charged and should not have been dismissed. 174 Wn.2d at 277. In reaching that conclusion, it used broad language about whether aggravators must be charged, finding that they need not be for the purposes of the analysis in that case. Id.

Siers, however, was focused on the constitutional requirements under Apprendi and Blakely, and the prospect of upholding the reversal of an underlying conviction which had, in fact, been properly charged. Further, the facts of Siers are vastly different from this case, where the prosecution chose to charge the case a particular way, filed an amended information and then sought punishment based on an allegation not included in that amended information. Under Theroff, and cases as far back as Navone, the amended information superseded the first. The exceptional sentence based on the uncharged aggravator should be reversed and the case remanded for imposition of a standard range sentence.

b. The aggravating factor of "Major Violation of the Uniform Controlled Substances Act" does not apply to an accomplice and there was insufficient evidence to support its application to Mr. Hernandez

In the original information, the prosecutor charged Hernandez with "acting as an accomplice," in committing both crimes. CP 1-2. In the

amended information, the prosecutor removed that language, instead accusing Hernandez of having himself "unlawfully, feloniously, and knowingly possess, with intent to deliver to another," the drugs. CP 91-92. During trial, the prosecutor urged the court to give proposed jury instructions telling the jury they could convict based on accomplice liability, and the court ultimately agreed. CP 147-48; 7RP 44.

In closing argument, the prosecutor specifically relied on accomplice liability, declaring that jurors did not have to figure out what each of the defendants had actually done because they were equally guilty "of whoever was in that apartment and repackaging those drugs and selling them[.]" 8RP 35. He urged the jurors to find Hernandez guilty as an accomplice for having agreed or aided another in planning or committing a crime. 8RP 21.

Under RCW 9A.08.020, a person may be found guilty for the crime of another as an accomplice if that person engages in a specific "accomplice act" with the knowledge that, in so doing, he will be furthering the crime. See, State v. Pineda-Pineda,154 Wn. App. 653, 661, 226 P.3d 164 (2010). The statute allows conviction of a crime even if the prosecution does not prove that a defendant committed all of the essential elements of the crime herself but instead proves only that the defendant solicited, encourage, aided or otherwise acted as an "accomplice," knowing that the acts she took would have the effect of aiding the specific crime. See State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000).

The general accomplice liability statute does not, however, authorize a court to impose an exceptional sentence on a person found guilty as an accomplice. State v. Hayes, 182 Wn.2d 556, 342 P.3d 1144 (2015). This is because that statute contains no "triggering device for penalty enhancements[.]" See State v. McKim, 98 Wn.2d 111, 115-16, 653 P.2d 1040 (1982).

As a result, when the state seeks to impose an exceptional sentence on someone who has been convicted as an accomplice, the Court must look at the statute defining the relevant aggravator in order to determine whether it explicitly applies to an accomplice. Hayes, 182 Wn.2d at 183-84. Put another way, the authorizing statute for that enhancement or aggravator must provide the authority to apply it to an accomplice. Pineda-Pineda, 154 Wn. App. at 661-62. For example, the firearm enhancement statute specifically applies "if the offender **or an accomplice** was armed with the firearm." RCW 9.94A.533(3) (emphasis added).

In contrast, in Hayes, supra, the aggravating factor involved a claim that the crime was a "major economic offense." 182 Wn.2d at 184. The Court first looked at the history of the changes to the accomplice liability statute over time, which included a transition from treating an accomplice as a principal and punishing them "as such" to punishment much more "tailored to individual culpability." Id.

The Court then found that our current law requires that an aggravator is imposed only "in relation to the accomplice's own conduct,"

rather than making the accomplice automatically liable for the substantive offense and aggravators based on participation of any degree. 182 Wn.2d at 564. Put another way, the Court held, unless the statute providing for the aggravating factor explicitly provides that it applies to an accomplice, "a sentencing judge can impose an exceptional sentence on an accomplice only where the accomplice's own conduct informs the aggravating factor." 182 Wn.2d at 563-64.

Indeed, the Court declared, to hold otherwise would be the same as reverting back to the old statutory scheme for accomplice liability, years beyond its demise. Id.

As a result, unless the authorizing statute provides for an accomplice to receive it, "any sentence enhancement must depend on the accused's own misconduct," under our current accomplice liability statute. See McKim, 98 Wn.2d at 115-16. Thus, in Pineda-Pineda, the court of appeals found that the "drug free zone" sentence enhancement" could not apply when the accomplice was not physically present in the protected zone and there was no finding that the defendant had known the crime would occur there. 154 Wn. App. at 662-3.

Similarly, in Hayes, the Court struck down imposition of an exceptional sentence based on the aggravating factor that the crime was a "major economic offense," which required the jury to find either 1) the crime involved multiple victims or multiple incidents per victim or 2) the crime involved a high degree of sophistication or planning or it occurred

over a long period of time. 182 Wn.2d at 559-60. The special verdict forms only asked the jury to find whether the crime was "a major economic offense or series of offenses," and the jury was told it had to find one of the alternatives beyond a reasonable doubt. 182 Wn.2d at 559-60. But there was no interrogatory asking which factor the jury had found and no instruction to the jury that it had to "look to the defendant's own misconduct to satisfy the operative language[.]" 182 Wn.2d at 563-64.

In reversing in Hayes, the Supreme Court's majority rejected the prosecution's theory that the issue was whether the *offense* met the required standards. The prosecution argued that, when the language of the aggravating factor is focused on whether "the current offense" meets certain standards, that factor should automatically apply to an accomplice and "should not be assessed on an individualized basis, but apply equally to all participants in a crime regardless of whether they are a minor or major participant." 182 Wn.2d at 565-66.

The Court dismissed that claim. 182 Wn.2d at 566. The prosecution was effectively urging the Court to "revert back to the 1909 complicity statute," the Court found. 182 Wn.2d at 566. But since that time, the Court found, the legislature "has abolished an approach that imposes automatic and coextensive punishment on accomplices unless it expressly indicates otherwise in the text of the statute." Id.

The Hayes majority further saw through the fallacy of the prosecution's argument:

> [U]nder the State's view, so long as "the current offense" constitutes a major economic offense, every accomplice qualifies for an exceptional sentence, leaving the decision to impose an exceptional sentence to the sentencing judge. The State reasons that because they are not compelled to impose an exceptional sentence, sentencing judges, in exercising their discretion, will "sort out" the less culpable defendants when choosing the appropriate sentence. **But such an overbroad interpretation of these sentence aggravators would undermine the aims of the SRA, which seeks to funnel judicial discretion and to establish consistency and uniformity in sentencing.**

Hayes, 182 Wn.2d at 566 (emphasis added).

The Hayes Court concluded that, when there is an aggravating factor which is phrased in terms of "the current offense," that factor does not apply to an accomplice unless the jury finds "that the defendant had some knowledge that informs that factor." 182 Wn.2d at 566. In Hayes, the jury's special verdict should have asked whether Hayes had "*knowledge* that informs the factors," the Court held, such as "whether Hayes knew that the offense would have multiple victims or multiple incidents per victim" or if he knew that it involved "a high degree of sophistication or planning or would occur over a lengthy period of time." 182 Wn.2d at 566. Instead, the jury had only been asked to decide if "the current offense" met the required standard, i.e., "about the nature of the offense, not about Hayes's role in it." Id. As a result, the exceptional sentence was reversed. Id.

In this case, as noted above, the aggravating factor upon which the exceptional sentence relied was not charged in the amended information upon which the trial was held. See CP 91-92. Even if it had been charged,

however, the aggravating factor could not support the exceptional sentence imposed on Mr. Hernandez, because the factor does not apply to an accomplice and did not apply here.

This Court applies de novo review to a question of statutory interpretation. See Hayes, 182 Wn.2d at 561. The relevant aggravating factor here was that the offense was a "Major Violation of the Uniform Controlled Substances Act," under RCW 9.94A.535(3)(e). That statute provides, in relevant part, that:

> [t]he current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA) related to trafficking in controlled substances, which was more onerous than typical offense of its statutory definition. The presence of any of the following may identify a current offense as a major VUCSA:
>
> . . .
>
> (ii) The current offense involved an attempted or actual sale of transfer of controlled substances in quantities substantially larger than for personal use;
>
> . . .
>
> (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
>
> (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement[.]

Nothing in that language explicitly authorizes applying the factor based on accomplice liability. To the contrary, just as in Hayes, the relevant parts of the statute defining the aggravator refers to "the current offense." See Hayes, 182 Wn.2d at 563-64. Further, subsection (3)(e)(iv)

focuses on what the offense shows about the "offender" - not the offender *or an accomplice.*

Thus, under Hayes, the exceptional sentence cannot stand based on the aggravator of a "Major Violation of the Uniform Controlled Substances Act" because Mr. Hernandez was convicted as an accomplice, unless the jury found that Mr. Hernandez's conduct/knowledge informed the factors making the current offense a "Major Violation."

The jury was not asked to make such findings. Instruction 19 provided:

> If you find the defendant guilty of unlawful possession of a controlled substance with the intent to deliver as charged in Count I and/or Count II then you must determine if the following aggravating circumstances exist:
>
> Whether the defendant possessed a controlled substance within one thousand feet of a school bus route stop designated by a school district with intent to deliver the controlled substance at any location; and
>
> Whether the crime was a major violation of the Uniform Controlled Substances Act.

CP 183. In Instruction 20, the jury was told, in relevant part:

> You will also be given special verdict forms for the crime of unlawful possession of a controlled substance with the intent to deliver for the crimes charged in counts I and II. If you find the defendant not guilty of these crimes. . . do not use the special verdict forms. If you find the defendant guilty of these crimes . . .you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 184. Instruction 21 told the jury the state had the burden of proving the aggravating circumstances beyond a reasonable doubt and that jurors had to "unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt" to find that factor. CP 185.

Instruction 23 then provided:

> A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of any of the following factors may identify the offense charged in Count I and/or Count II as a major trafficking violation:
>
> Whether the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; and/or
>
> Whether the circumstances of the offense reveal that the defendant occupied a high position in the drug distribution hierarchy; and/or
>
> Whether the offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of distribution.

CP 187. None of those instructions asked the jury about Hernandez' own conduct as opposed to as an accomplice, nor did the special verdict forms provide such findings. The form for count I provided:

> We, the jury, having found the defendant guilty of unlawful possession of a controlled substance with the intent to deliver as charged in Count I, return a special verdict by answering as follows:
>
> QUESTION [1]:
>
> Was the crime a major violation of the Uniform Controlled Substances Act?
>
> ANSWER: __YES__ (Write "yes" or "no")

CP 204. A similar form was submitted and filled out with a "yes" for count II. CP 205.

Thus, here, just as in Hayes, the jury was asked to determine whether the crime met a particular standard, i.e., involved greater amounts than for personal use, whether it involved a high degree of planning, or occurred over a broad geographic area, etc. See Hayes, 182 Wn.2d at 559-60. The only factor which referred to the defendant was still in light of the circumstances of the offense, i.e., whether those circumstances showed that the unnamed defendant occupied a high position in the drug distribution hierarchy," but the jury was not told that it had to "look to the defendant's own misconduct to satisfy the operative language" of the aggravator. 182 Wn.2d at 563-64

And indeed, the prosecutor specifically argued the claims regarding the aggravator focusing on the crime or all three defendants at once, not the individual culpability of each of the men involved. He argued that the crime was more onerous than typical, that there were "substances substantially larger than for personal use" even "with three people" and there were not any pipes or ingesting devices in the apartment to indicate the drugs were for personal use. 8RP 29. The prosecutor also argued that, based on the detective's testimony, the jury should find "the Defendants constituted a high position in the drug distribution hierarchy," because the detective had described a business model where "[h]igh level dealers" rent apartments where they store their drugs but do not live and drive multiple

cars and based on the way the drugs were "packaged and stored." 8RP 29. And the prosecutor argued that the crimes occurred over a "broad geographic area of distribution" because Espinoza had driven up from California and was on his way back with money and Catlett said that this was "typical trafficking" with I-5 as "a conduit." 8RP 30. Also apparently urging a theory of sophistication, the prosecutor pointed to the use of "traps in their cars," the fact that Espinoza had just arrived from California, the amount of drugs, the multiple cars, the fact that Hernandez and Camacho had aliases and Camacho's truck having a trap- in addition to the "Barney" evidence. 8RP 31.

Indeed, a moment later, the prosecutor told the jury that all of the men were equally guilty, no matter "who the main drug dealer is," because they were all "involved in trafficking in a large number of drugs," from California to Pierce County, making a lot of money doing it. 8RP 34-35.

The aggravating factor that each crime was a "Major Violation of the Uniform Controlled Substances Act" did not explicitly apply to an accomplice, and the finding of the jury on that factor was not properly based on consideration of Hernandez' specific conduct, rather than his conduct as an accomplice. The exceptional sentence must be reversed.

c. The two crimes amounted to the same criminal conduct

Under RCW 9.94A.589(1)(a), when a defendant is being sentenced for two or more current offenses, those offenses are counted as prior conviction unless the court finds that they "encompass the same criminal

conduct." See, e.g., State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013). In this context, "same criminal conduct" means the crimes involve the same criminal intent, the same time and place and the same victim. See State v. Vike, 125 Wn.2d 407, 895 P.2d 824 (1994). The possession of different drugs with intent to deliver here occurred in the same time and place, the victim is the same (the public) and the possessions occurred with the same intent i.e., to further "the overall criminal objective of delivering controlled substances in the future." See State v. Garza - Villarreal, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993). Indeed, in Garza-Villarreal, the Supreme Court held that possession with intent to deliver heroin and possession with intent to deliver cocaine found pursuant to a search warrant amounts to the same criminal conduct - 20 years before the sentencing in this case. 123 Wn.2d at 47.

Here, the two crimes involved possession of different substances in the same place at the same time, with the same intent. The two crimes should have been counted as the same criminal conduct in the offender score. Further, because imposition of an exceptional sentence is improper based upon an incorrect offender score, reversal of that sentence is required. See, e.g., State v. Parker, 132 Wn.2d 182, 186, 937 P.2d 575 (1997).

d. Appointed counsel was prejudicially ineffective

Overarching the sentencing proceeding was the ineffectiveness of appointed counsel. Both the state and federal constitutions guarantee the

accused the right to effective assistance of appointed counsel at a criminal trial. See State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is ineffective despite a strong presumption of effectiveness if his performance falls below an objective standard of reasonableness under prevailing professional norms (and is thus "deficient") and there is a reasonable probability that counsel's deficient performance affected the outcome of the trial. Strickland, 466 U.S. at 688; Thomas, 109 Wn.2d at 225-26.

Those standards are met in this case, in multiple ways. First, counsel apparently did not notice that his client was being sentenced based on an aggravator which was not charged in the amended information. At least he made no mention of that error or argument against the exceptional sentence below. See 10RP 1-19.

Indeed, counsel *argued* for an exceptional sentence - albeit one less harsh than that advocated for by the state. That alone might possibly be seen as a tactical decision, were it not for the failure to note the inapplicability of the aggravator to Hernandez as an accomplice, and the failure to note that the two crimes amounted to the same criminal conduct, despite caselaw supporting it. But it cannot be a strategic decision to fail to argue same criminal conduct where it likely would apply. See State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2014). There is more than a reasonable probability that the sentencing court would have found the

offenses involved the same criminal conduct, based upon the clear precedent of Garza-Villareal. And it would have reduced the standard range, which would have cast even more doubt on the exceptional sentence and the orders of magnitude above the standard range the prosecution was urging the court to impose.

The exceptional sentence must be reversed. The prosecution chose to go to trial on an information which deleted the relevant aggravtor factor, instead adding a school bus route stop enhancement. Further, the "Major Violation of the Uniform Controlled Substances Act" aggravating factor does not explicitly apply to an accomplice and did not apply here, under Hayes. And throughout, counsel was ineffective, failing to ensure that his client was sentenced properly. On reversal for entry of a standard range sentence, new counsel should be appointed, to ensure that Mr. Hernandez is not again denied effective assistance in this case.

2. THERE WAS INSUFFICIENT EVIDENCE TO PROVE HERNANDEZ GUILTY OF POSSESSING THE DRUGS FOUND IN THE APARTMENT

Both the state and federal constitutions mandate that a conviction must be based upon sufficient evidence to prove every element of the offense, beyond a reasonable doubt. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Evidence is only sufficient if, taken in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. See State v. Rose, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012). Where the evidence fails to meet that standard, reversal

and dismissal with prejudice is required. See State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

In this case, there was insufficient evidence to prove that Hernandez was guilty of possessing the drugs found in the apartment, as a principal or accomplice, for either count. To prove guilt for unlawful possession, the prosecution must prove either actual physical possession, or that the defendant was in "constructive" possession of the forbidden item. See State v. Raleigh, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029 (2011). Herndandez was not found with any drugs. There were none on his person, or the person of his wife or children. There were none in his car. He was never seen in actual possession of any of the drugs found later in the apartment.

Thus, the only possible theory of guilt as a principal is constructive possession. To determine whether there was constructive possession the court looks at whether, "under the totality of the circumstances, the defendant exercised dominion and control over the item in question." State v. Nelson 182 Wn.2d 222, 227, 340 P.3d 820 (2015). Dominion and control can be proven by ownership of the item, for example a gun registered to the defendant, or in some situations can come from ownership of the premises in which an item is found. Id. But the fact that the defendant was near something does not establish dominion and control. See State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

Mere proximity is not enough, and while the "ability to reduce an

object to actual possession" may show "dominion and control" over it, other aspects must also be considered and even knowledge and being in the presence of contraband is insufficient without more to prove dominion and control and establish "constructive possession." See State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d 793(1983).

Indeed, having such control over the premises where an item is found does not, by itself, prove constructive possession. Nelson, 182 Wn.2d at 234; see State v. Callahan, 77 Wn.2d 27, 31, 459 P.2d 400 (1969). Thus, in Callahan, even though the defendant was temporarily living on a houseboat, admitted to handling the drugs momentarily and was in close proximity to the drugs, that was insufficient to establish "dominion and control" over the drugs for the purposes of proving possession.

Similarly, in Nelson, the Supreme Court reversed this Court's holding that Letrecia Nelson had exercised sufficient control over a gun brought into her house unexpectedly by Maurice Clemmons after he shot and killed officers in a coffee shop in Lakewood. 182 Wn.2d at 225-26. Nelson had briefly handled the gun to put it in a bag for Clemmons to take with him, and such "momentary or passing control" was insufficient to prove actual possession. Id. Further, although the gun was in her house and thus technically in her "dominion and control" as a result of being there, she did not assert any interest in the gun but just briefly handled it for Clemmons, the true possessor of the weapon. 182 Wn.2d at 234-35.

Here, there was not sufficient evidence to prove Hernandez had constructive possession over the drugs found hidden in the apartment. It was Camacho, not Hernandez, who had the key. It was Camacho, not Hernandez, whose identification was inside. It was Camacho's PT cruiser and Camacho's truck which had the modifications on them "consistent" with drug dealing. At most, the evidence was that Hernandez confessed to being a small-time dealer, had lots of money in his car and had been inside an apartment where drugs were later found for awhile.

This evidence was also insufficient to prove Hernandez was guilty as an accomplice. There was no evidence that he solicited, commanded, encouraged or otherwise aided anyone in securing the drugs. The only evidence was that he had been in the apartment, was possibly seen putting things into a car later found to have no contraband, and was in a car with his wife and children with a lot of money which he plausibly said was for a real estate transaction. His admission to being a small-time drug dealer, without more, was insufficient to support his conviction as an accomplice. Because the evidence was insufficient, reversal and dismissal is required.

3. THE LOWER COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF AN UNCONSTITUTIONAL WARRANT BASED ON UNRELIABLE INFORMATION AND AN UNCONSTITUTIONAL SEARCH

Both the state and federal constitutions prohibit unreasonable searches and seizures. See State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). But our state constitution provides greater protection than the

Fourth Amendment. See State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). Under Article 1, § 7, the focus is not "unreasonable" governmental action but the more stringent question of protecting citizens against state intrusion into their private affairs, recognizing that right to privacy "with no express limitations." See State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

In this case, Mr. Hernandez' rights under both the state and federal clauses were violated and the trial court erred in failing to suppress evidence which was the result of an unconstitutional dog "sniff" search, was based on a warrant issued without sufficient probable cause and was not sufficient. Pursuant to RAP 10.1(g), Hernandez adopts and incorporates herein the arguments of codefendants Camacho and Espinoza regarding the violations of both the Fourth Amendment and Article 1, § 7, based on the insufficiently supported warrant, the dog "sniff" evidence and search and the failure of the court to suppress the evidence seized from the cars and apartment.

In addition, Hernandez submits the following:

Before trial, Hernandez moved to suppress the evidence seized from the cars and the apartment during the execution of the search warrant. CP 17. He argued that the application for the warrant was constitutionally insufficient, because it depended on stale information, was based on an "illegal search by the drug detection dog, in violation of Article 1, Section 7," and was not otherwise supported by sufficient evidence. CP 17-29.

In ruling, the judge found that, on the whole, the "Barney/Betts" team was "a valid instrument to detect drugs or can be." 6/7RP 10. The judge did not suppress the evidence from the sniffs of the cars, finding that, although the cars were not parked in a parking lot, it was a "parking lot open to other people" and thus there was "no private interest that they can logically assert in the air outside of their cars in the parking lot." 6/7RP 10-11. The court found that it was not a search under either the state or federal constitutions. 6/7RP 11. The judge also held that, in reviewing the warrant, he would not consider the illegal search of the door but would consider the testimony about Barney and the cars. 6/7RP 14.

In closing argument, the prosecutor specifically relied on the evidence from Barney. 9RP 31. While admitting that Barney could not tell people how long drugs had been in the cars on which the dog alerted or "even if they're currently there," the prosecutor went on:

> to use an analogy that would be something that we could relate to, if you're a nonsmoker and you go into the motel room that used to be a smoking room, it's usually strong enough for even the human nose to detect. Now, you can't tell how long ago that room had been used as a smoking room, but your nose tells you that at some point that is what that room was used for, **and that's what Barney told us in regards to this truck**[.]

9RP 32 (emphasis added). A moment later, the prosecutor relied on "alerts from Barney on the cars in the parking lot," in addition to Hernandez' admission he sold drugs as a small-time dealer, as evidence of guilt. 9RP 33-34.

For his part, in closing argument, counsel for Hernandez tried to

reduce the impact of the drug dog alerts, arguing that the alerts did not mean there were drugs in the vehicle and no drugs were found in Hernandez' vehicle. 9RP 54-55; see 9RP 56 ("[d]id Barney alert upon the area where the money had been located"); 9RP 67 (Barney "did not alert, whatsoever, on that vehicle when it was in the controlled environment").

In rebuttal closing argument, the prosecutor again relied on the evidence from Barney, that he had sniffed the car in the parking lot and alerted on the trunk and the passenger side, as evidence that "either drugs were" in the car or "they had been." 9RP 81.

The trial court erred in failing to suppress the evidence seized after an unconstitutional "sniff" search of the cars, based on an insufficiently supported warrant, as argued herein and in the briefing of codefendants/coappellants. This Court should so hold and should reverse.

4. THE LOWER COURT ERRED IN ORDERING FORFEITURE OF PROPERTY WITHOUT STATUTORY AUTHORITY

Under the Sentencing Reform Act, the Legislature alone has the authority to establish the scope of legal punishment. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). As a result, a sentencing court has only the authority granted by the Legislature by statute. See State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999).

For this reason, a sentencing court has no "inherent" authority to order specific conditions of a sentence and must instead have a statutory

grant upon which to rely. State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992). Further, the court must act within the confines of the authority it is granted. Id. When a sentencing acts outside its statutory authority, its action is void and the error may be raised for the first time on appeal. See State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002).

In this case, after imposing the sentences on all three defendants, the judge then declared, apparently for all of the defendants, "[p]roperty subject to forfeiture, including any vehicles seized, any money seized or any other property, will be forfeited." 10RP 19. Written on the judgment and sentence for Mr. Hernandez was, "forfeit items in property." CP 248.

The trial court erred and acted without statutory authority in entering this order. In reviewing this issue, the court applies de novo scrutiny. State v. Roberts, supra. And with such scrutiny, the order fails. "Forfeitures are not favored." City of Walla Walla v. $401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). Further, there is no "inherent" authority to order forfeitures, which must instead by authorized wholly by statute. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 856387 (1997), review denied, 134 Wn.2d 1016 (1998).

Put another way, a trial court has no authority to order forfeiture unless there is a specific statute authorizing that order. Alaway, 64 Wn.

App. at 800-801. And this is true even when a defendant is accused or convicted of a crime. Id. As this Court noted in Alaway, there is no "inherent authority to order the forfeiture of property used in the commission of a crime." Alaway, 64 Wn. App. at 800-801. It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. Id.; see Espinoza, 87 Wn. App. at 866.

Here, there was no discussion whatsoever of any statutory authority to order forfeiture of any items below before the court entered that order. See 10RP 1-19. But there was no statutory authority to support it.

Even a cursory examination of the law proves this point. While RCW 10.105.010 authorizes law enforcement agencies to seize and forfeit certain items used in relation to or traceable in specific ways to the commission of a felony, the statutory requirements for those forfeitures were not followed here. The seizing agency - here, the police - must serve proper notice on all persons with a known right or interest in the property, who then have a right to a hearing where they can attempt to establish an ownership right. RCW 10.105.010(3), (4) and (5). The forfeiture proceedings are held as a **separate civil matter**, with the deciding authority **not** the superior court. RCW 10.105.010(6).

RCW 10.105.010 thus does not support the sentencing court taking the step of ordering, as a condition of a sentence in a criminal case, the forfeiture of property without following any of the requirements of the

statute for notice, proof, a possible hearing, etc.

Other forfeiture statutes similarly authorize a law enforcement agency - rather than the sentencing court - to conduct forfeiture proceedings for property in relation to certain crimes. RCW 69.50.505 governs forfeitures related to controlled substances, allowing forfeiture of controlled substances, raw materials for such substances, properties used as containers for them, and other conveyances and items used in drug crimes. To have that authority, however, the "law enforcement agency" seeking the seizure has to provide notice of intent of forfeiture on anyone with known rights or interests in the property, who then have an opportunity to be heard, often at a civil hearing "before the chief law enforcement officer of the seizing agency," or, if the person exercises the right of removal, may be in a court of competent jurisdiction under civil procedure rules, at which the law enforcement agency must establish that the property is subject to forfeiture. See RCW 69.50.505; Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Other forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, **in separate civil proceedings**, that property should be forfeited as a result of its relation to a crime. RCW 9A.83.030 governs forfeitures

associated with money laundering and required that the attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, provide notice to all persons with known rights, and gives the person affected the right to a hearing under the same circumstances as in drug forfeiture cases and other rights, prior to forfeiture occurring. RCW 9.46.231 governs forfeitures associated with gambling laws, requiring notice within 15 days of the seizure to any with a known right or interest, the right to a hearing, the right to removal in certain cases, the right to appeal, and the concomitant right of the state and agency to reap financial benefits from selling the items seized, in various iterations.

None of these statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant seized by police based solely upon his criminal conviction without at least a modicum of proof that the property was somehow involved in or the fruits of criminal activity. See, e.g., Alaway, 64 Wn. App. at 798 (rejecting the idea that the sentencing court had "inherent power to order how property used in criminal activity should be disposed of").

Indeed, in Roberts, supra, this Court recently addressed the same issue in a case from the same lower court as here, Pierce County Superior Court. 185 Wn. App. at 95-96. In that case, as here, the judge ordered forfeiture of property as part of a judgment and sentence, with nary a citation to statute in support. This Court held that "the trial court erred in

ordering forfeiture in the absence of any statutory authority." 185 Wn. App. at 95.

Further, as this Court has specifically held, a defendant is not automatically divested of his property interests in even items used to create contraband, simply by means of conviction. Alaway, 64 Wn. App. at 799. Instead, this Court declared, "the State cannot confiscate" a citizen's property "merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures." Id.

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction, as it was here. And indeed, to the extent that the trial court may have assumed it had authority to order the forfeiture based solely upon the fact that Mr. Hernandez was convicted of a crime, that assumption runs directly afoul of RCW 9.92.110, which specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." Under the statute, the mere fact that the defendant was convicted of a crime is not sufficient on its own to support an order of forfeiture.

The forfeiture condition was not statutorily authorized and must be stricken.

5. THE LOWER COURT ERRED IN ORDERING HERNANDEZ TO PAY LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO HIS ABILITY TO PAY

In addition to the other errors, this Court should also reverse and remand for resentencing with instructions for the trial court to engage in the analysis set forth by the Supreme Court recently in State v. Blazina, supra, prior to imposing legal financial obligations on Mr. Hernandez, who is indigent. Because the trial court did not follow the requirements of RCW 10.01.160(1), and because this case presents the very same policy concerns which compelled our highest court to act even absent an objection below in Blazina, this Court should reverse and remand for a new sentencing hearing.

Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

In Blazina, our highest Court recently interpreted RCW 10.01.160(3). Blazina involved two consolidated cases, each with an indigent defendant. 344 P.3d at 683-84. In one case, the sentencing court ordered a $500 crime victim penalty assessment, a $200 filing fee, a $100

DNA fee, $1,500 for assigned counsel and restitution to be determined "by later order." 344 P.3d at 682-83. The other sentencing court ordered the same fees except only $400 for appointed counsel and an additional $2,087.87 in extradition costs. Id.

Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. Id.

On review, the defendants argued that the failure to comply with the requirements of RCW 10.01.160(3) on the record was error. The prosecution first argued that the issue was not "ripe for review" until the state tried to enforce collection of the amounts imposed. Blazina, 344 P.3d at 682-83 n. 1. The Supreme Court majority found instead that the issue was primarily legal, did not require further factual development and involved a final action of the sentencing court, a conclusion of "ripeness" with which the concurring justice seemed to agree. Id.[3]

The Court majority also found that RCW 10.01.160(3) was mandatory, noting that it requires that a trial court "**shall not**" order costs without making an "individualized inquiry" into the defendant's individual financial situation and their current and future ability to pay, and that the trial court "**shall**" take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" in determining the amount and method for paying the costs. 344 P.3d at 685 (emphasis in original). And the Court found that, in this context, the word

[3]This portion of the decision was unanimous, but one justice would have used a different method of reaching the issues on appeal. See 344 P.2d at 686.

"shall" is imperative. Id.

Further, the majority agreed with the defendants in both of the consolidated appeals that the individualized inquiry must be done on the record. 344 P.3d at 685. They then rejected the a "boilerplate" clause, preprinted on the judgment and sentence, as sufficient:

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors. . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

344 P.3d at 686.

The Blazina majority then gave sentencing courts guidance on making the determination of "ability to pay," referring them to the comments to GR 34 which set forth nonexclusive ways of determining indigency, including looking at household income, federal poverty guidelines, whether the person receives federal assistance and other relevant questions, specific to that particular defendant. Id.

The Blazina majority found that, in crafting RCW 10.01.160(3) the Legislature "intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances." Id.; see also, 344 P.3d at 686 (Fairhurst, J., concurring). Further, the majority believed that the trial judge's failure to consider the defendants' ability to pay in the consolidated cases on review in Blazina

was "unique to these defendants' circumstances." Blazina, 344 P3d at 683-84. The Court therefore believed that the failure of a sentencing court to properly consider the defendant's present and future ability to pay was an error not expected to "taint sentencing for similar crimes in the future." 344 Wn.2d at 683.

But the majority nevertheless decided to reach the issue. While stopping short of faulting lower appellate courts for declining to exercise their discretion to do so thus far, the Blazina Court held that "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." 344 Wn.2d at 683. The Court chronicled national recognition of "problems associated with LFO's imposed against indigent defendants," including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems." Id. One of the proposed reforms the Court mentioned was a requirement "that courts must determine a person's ability to pay before the court imposes LFOs." Id.

The Court then noted the flaws in our own state's LFO system and the system's "problematic consequences." 344 P.3d at 684. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. 344 P.3d at 683-85. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford $25 a month will end up owing

more than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 344 P.3d at 684-85. This increased involvement "inhibits reentry," the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other "reentry difficulties increase the chances of recidivism." Id.

Finally, the Blazina majority pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. 344 P.3d at 685-86. The court also noted that certain counties seem to have higher LFO penalties than others. Id.

The concurrence in Blazina agreed that the issue required action by the Court, but disagreed with how the majority applied RAP 2.5(a) and its exceptions. 344 P.3d at 686-87. The concurrence would have found the error non-constitutional and would not have addressed it under RAP 2.5(a)(3) but would instead have reached the issue under RAP 1.2(a), "to promote justice and facilitate the decision of cases on the merits." Id. The

concurring justice felt it was appropriate for the court to exercise its discretion to reach the unpreserved error "because of the widespread problems" with the LFO system as applied to indigents "as stated in the majority." Id. And she also would have reached the error, because "[t]he consequences of the State's LFO system are concerning, and addressing where courts are falling short of the statute will promote justice." Id.

In this case, at sentencing, there was no discussion of Mr. Hernandez' personal financial situation, his potential ability for employment, his skills, his assets and debt, the potential impact of the years of incarceration ordered or any of the other relevant, crucial questions trial courts should examine under RCW 10.01.160 after Blazina, the trial court simply ordered the legal financial obligations at the requested amount. Further, the judgment and sentence contained the same pre-printed clause which was found insufficient in Blazina.

Thus, Mr. Hernandez is in the same situation as the defendants in the consolidated cases in Blazina. He will suffer the impacts of the unfair and unjust system our Supreme Court has now condemned unless this Court follows Blazina and orders resentencing. The resentencing court should be ordered to consider Mr. Hernandez' "individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay," on the record as set forth in Blazina, before deciding whether it should even impose legal financial obligations.

Pursuant to RAP 1.2(a), this Court is tasked with interpreting the

rules and exercising its discretion in order to serve the ends of justice. Blazina was a watershed in our state. Every single justice on our highest court agreed that our state's system of imposing legal financial obligations is so racially biased, unfair, improperly enforced and debilitating to the possibility of any rehabilitation for indigents that the justices unanimously agreed to take the extremely unusual step of addressing the issue for the first time on appeal, *even though they agreed it was non-constitutional error*.

In so doing, the Blazina Court took a courageous step towards working to ensure that poor people convicted of crimes are not permanently marginalized as a sub-class of our society, never able to climb out from the ever-deepening hole of legal debt even if, as the Blazina Court noted, those people make full minimum payments for *years*.

For our highest state court to so rule sends a very clear message. While it was not error or an abuse of discretion for lower appellate courts to fail to take action prior to Blazina, the unprecedented message of Blazina is that our highest Court intends to ensure that the injustices in our LFO system are redressed. For this Court to decline to do so after the Blazina decision would not only perpetuate the same injustices our high Court has just condemned but amount to a significant unfairness, rising to the level of a due process violation.

The Blazina decision represents a fundamental recognition by our highest court that the system under which appellant was ordered to pay

LFOs is flawed and unjust. The concerns shared by all of the justices on the Supreme Court in Blazina apply equally here as to the defendants in the two separate cases consolidated in Blazina. This Court should grant Mr. Hernandez the same relief as the defendants in Blazina and, in addition to the other remedies requested, should strike the LFO's and order reversal and remand for resentencing with orders for the trial court to give full and fair consideration to Mr. Hernandez' individual financial circumstances and present and future ability to pay before imposition of any LFOs.

E. CONCLUSION

There was insufficient evidence to support the convictions. In the alternative, the exceptional sentence must be reversed, new counsel should be appointed and the Court should reverse the improper order of forfeiture and the LFOs.

DATED this 22nd day of October, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EMAIL AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and codefendant's counsel via this Court's upload service at pcpatcecf@co.pierce.wa.us, sccattorney@yahoo.com, backlundmistry@gmail.com,, and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Mr. Gerardo Hernandez, DOC 846105, Stafford Crrek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 22nd day of October, 2015.

/s/ Kathryn Russell Selk
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